IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

BURLINGTON NORTHERN RAILROAD CO.
Plaintiff

V. NO. 3:95CV116-B-A

JOHN DEATHERAGE, UNITED VAN LINES, INC., and UNITED LEASING COMPANY
Defendants

MEMORANDUM OPINION

This cause comes before the court upon the plaintiff's motion for partial summary judgment, as well as motions to strike by both parties. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

This case involves a collision between a Burlington Northern train and a United Van Lines tractor-trailer at a railroad grade crossing in Pontotoc County, Mississippi. The plaintiff railroad filed suit for property and other similar damages it incurred as a result of the collision. The defendant owners of the tractor-trailer rig filed a counterclaim for property damages of their own. In their counterclaim, the defendants assert that the plaintiff was guilty of common law negligence in the operation of its train and/or in the design and maintenance of the subject railroad crossing.

The plaintiff has moved for partial summary judgment on the issues of train speed and the adequacy of the grade crossing warnings. The plaintiff contends that the Federal Railroad Safety Act ("FRSA") preempts any claims the defendants may assert as to these two issues.

The crossing in question was equipped with passive warning devices.[1] It is undisputed that the railroad track in question was a class 4 track with a 60 m.p.h. speed limit imposed by federal regulation. It is further undisputed that the plaintiff's train was traveling 44 m.p.h. at or immediately prior to the time of collision.

LAW

A. Plaintiff's Motion to Strike

The defendants have submitted the fifteen page affidavit of their expert witness, Kenneth Heathington, which addresses the alleged hazards presented at the subject crossing as well as the signalization necessary to adequately address the safety deficiencies found by the expert. The affidavit further spends several pages analyzing the law of federal preemption and the effect of the Supreme Court's ruling in CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 123 L. Ed. 2d 387 (1993). Heathington lists eighteen items upon which he relied in forming his opinions, including "Data provided by the Mississippi Department of Transportation." The plaintiff moves to strike portions of Heathington's affidavit on the grounds that no witness is competent to testify as to legal opinions or conclusions, and that Heathington relied, in part, on information that is inadmissible under 23 U.S.C. § 409. Under 23 U.S.C. § 409, reports, surveys, data, etc., compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of railway-highway crossings shall not be admitted into evidence in any action for damages arising from an occurrence at a location mentioned in such report.

The court finds that, while 23 U.S.C. § 409 precludes admission of Mississippi

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[1] While the parties do not specify exactly which devices were present, passive warning devices typically include reflectorized crossbucks, advance warning signs, and painted markings in the road. It should be noted that the court is not making any assumptions as to exactly which of these passive warning devices were present at the subject crossing.

Department of Transportation data pertaining to the safety of the subject crossing, said data was but one item out of many that the expert used to formulate his opinion. It is nearly impossible for this court to determine from the affidavit which statements were based upon the inadmissible data. Therefore, for purposes of the plaintiff's motion for partial summary judgment, the court will not strike any portions of Heathington's affidavit on the grounds that it relies upon inadmissible evidence. However, the court does find that the portions of the affidavit which attempt to instruct the court on the law of preemption should be stricken, as a witness is not permitted to testify as to legal conclusions. See Snap-Drape, Inc. v. Commissioner of Internal Revenue, 98 F.3d 194, 197-198 (5th Cir. 1996) (expert witness reports containing legal conclusions and statements of mere advocacy properly excluded; F.R.E. 704 does not allow expert to render conclusions of law); see generally Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983) (witness not permitted to give legal conclusions). The court finds that the paragraphs that should be stricken are paragraphs IV, V, VI, VII, VIII, IX, and X. The appropriate place for such a legal analysis is the defendants' brief, not the affidavit of an expert witness.

B. Defendants' Motion to Strike

The plaintiff has submitted the affidavit of Newton McCormick, an employee of the Mississippi Department of Transportation, which states that in 1982 and 1983, federal funds were used to upgrade and install advance warning signs on both sides of the subject crossing. The defendants move to strike McCormick's affidavit on the grounds that it is based upon evidence that is inadmissible under 23 U.S.C. § 409. The court finds that the defendants' motion to strike should be denied. 23 U.S.C. § 409 was implemented to foster the free flow of information in the signalization decision making process. If data collected by the Department of

Transportation concerning the safety of various grade crossings was admissible in court, railroads would be hesitant to cooperate in the compilation of such data, which would hinder the ability to ensure that all railroad crossings are rendered as safe as possible. However, nothing in § 409 indicates that evidence concerning the mere use of federal funds should be excluded as inadmissible. Affidavits of state Department of Transportation employees attesting to the use of federal funds at specific crossings have been considered by many courts, including the Fifth Circuit Court of Appeals and the United States District Court for the Southern District of Mississippi, in considering claims of federal preemption. See Hester v. CSX Transp., Inc., 61 F.3d 382, 385-387 (5th Cir. 1995), cert. denied, ___ U.S. ___, 133 L. Ed. 2d 760 (1996); Williams v. CSX Transp., Inc., 925 F. Supp. 447, 451 (S.D. Miss. 1996). To accept the defendants' position regarding the admissibility of McCormick's affidavit would eliminate the doctrine of federal preemption of inadequate signalization claims, as there would be no way to prove that federal funds were used to install or upgrade the signalization at specific crossings.

C. Plaintiff's Motion for Partial Summary Judgment

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

The preeminent case on FRSA preemption of speed and inadequate signalization claims is CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 123 L. Ed. 2d 387 (1993), in which the United States Supreme Court stated that applicable federal regulations may preempt any state law, rule, regulation, or standard relating to railroad safety. Id., 507 U.S. at 664, 123 L. Ed. 2d at 396-397. Legal duties imposed upon railroads by virtue of state common law fall within the scope of the preemption. Id. According to the Supreme Court in Easterwood, claims for excessive speed are preempted if the train is indisputably travelling within the federal speed limit set for that particular class of track. Easterwood, 507 U.S. at 673-675, 123 L. Ed. 2d at 402-404; see also Wright v. Illinois Cent. R.R. Co., 868 F. Supp. 183, 186-187 (S.D. Miss. 1994). Since the plaintiff's train was indisputably travelling 44 m.p.h., well within the 60 m.p.h. speed limit set by federal regulations, the court finds that any claims the defendant may wish to raise for excessive speed are preempted by federal law.

The plaintiff asserts that the train's engineer has testified that the grade crossing in question was a dangerous crossing at which he had experienced numerous close calls as well as some accidents, and that the speed the railroad required him to operate was in excess of a safe rate of speed. Said testimony does nothing to avoid federal preemption. The law is crystal clear

that if the train is travelling within the federal speed limit, preemption applies. Furthermore, whether or not the railroad should have imposed a more restrictive speed limit upon its trains is irrelevant to the issue of preemption.[2] See Michael v. Norfolk S. Ry. Co., 74 F.3d 271, 273 (11th Cir. 1996) (railroad's negligence in violating its own speed regulations would not preclude preemption if the train was travelling within the federal speed limit; internal railroad regulations are irrelevant to the issue of preemption).

Although the defendants did not specifically raise the local hazard exception in their brief, the court did consider the exception in reaching its conclusion. 49 U.S.C. § 20106 provides a savings clause whereby a state may adopt an additional or more stringent law when the law (1) is necessary to reduce an essentially local hazard, (2) is not incompatible with a law or regulation of the United States Government, and (3) does not unreasonably burden interstate commerce. Congress created the savings clause so that states could address unique local conditions that (1) could not be adequately addressed by uniform national standards and (2) were not statewide in character. Easterwood v. CSX Transp., Inc., 933 F.2d 1548, 1553 n.3 (11th Cir. 1991), aff'd sub nom 507 U.S. 658, 123 L. Ed. 2d 387 (1993). The savings clause is to be narrowly construed. Easterwood, 933 F.2d at 1553 n.3; Wright, 868 F. Supp. at 187. The defendants have produced no evidence that there is any unique quality about this crossing that warrants application of the savings clause. The defendants' expert has stated that there was a problem with limited sight distance at this crossing, but the court finds that there is no evidence that this deficiency is in any way a purely local hazard. See Wright, 868 F. Supp. at 187 (plaintiff's argument regarding vegetation, grade, and angle of the crossing creating a local

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[2] The railroad had already imposed a 45 m.p.h. speed limit on this particular train, which speed limit the engineer was obeying at the time of the collision.

hazard, if accepted, would swallow the clear intent of preemption). Furthermore, the savings clause provides that under certain conditions, a state may adopt an additional or more stringent law than that imposed by the federal government. However, in the preadditional or more stringent law regarding the crossing in question.

The Supreme Court further stated in Easterwood that inadequate signalization claims are preempted by federal law if federal funds have been expended to install, upgrade, or repair the signalization at the crossing in question. Easterwood, 507 U.S. at 670-671, 123 L. Ed. 2d at 400-401. The affidavit of Newton McCormick, an employee of the Mississippi Department of Transportation, establishes that federal funds were expended to install advance warning signs at the subject crossing. The defendants have presented no evidence to contest the use of federal funds at the subject crossing. Therefore, the court finds that any claims the defendants may wish to raise for inadequate signalization are preempted by federal law.

The source of preemption of inadequate signalization claims is found in 23 C.F.R. § 646.214(b)(3) and (4). Easterwood, 507 U.S. at 670, 123 L. Ed. 2d 400. 23 C.F.R. § 646.214(b)(3) and (4) set forth the method for determining what constitutes adequate warning devices at each railroad crossing. Several factors are listed in subsection (b)(3) which, if present, require the use of automatic gates with flashing lights, unless a diagnostic team justifies that gates are not appropriate. Subsection (b)(4) states that if the requirements of subsection (b)(3) are not applicable, then the type of warning device installed is subject to the approval of the Federal Highway Administration ("FHWA").

The defendants assert that one or more factors listed in subsection (b)(3) are present so that automatic gates with flashing lights are required at the subject crossing. According to the defendants' expert witness, the factors that are present include limited sight distance, high speed

train operations, and prior accidents. The defendants further assert that there is no evidence of FHWA approval, and no diagnostic team justified the absence of automatic gates.

Despite the defendants' vigorous assertion to the contrary, their inadequate signalization claims are clearly preempted by federal law since federal funds participated in the installation of warning devices at the crossing. See Easterwood, 507 U.S. at 670-671, 123 L. Ed. 2d 400-401; Hester v. CSX Transp., Inc., 61 F.3d 382, 385-387 (5th Cir. 1995), cert. denied, ___ U.S. ___, 133 L. Ed. 2d 760 (1996). In Hester, the Fifth Circuit Court of Appeals affirmed a district court ruling which granted partial summary judgment in favor of the railroad as to Hester's claim for inadequate signalization, based upon the affidavit of Newton McCormick showing that federal funds had been used to upgrade and install passive warning devices at the crossing in question. In so ruling, the appellate court reasoned that since federal regulations direct the federal government to authorize funds only for projects that satisfy federal law, then the fact that federal funds were used presupposes federal approval that the safety devices were appropriate. Hester, 61 F.3d at 387. Since it is undisputed that federal funds were used to install warning devices at the subject crossing in Pontotoc County, this court need not analyze the application of 23 C.F.R. § 646.214(b)(3) and (4). The use of federal funds is the equivalent of federal approval, and therefore, federal preemption applies. See also Armijo v. Atchison, Topeka and Santa Fe Ry. Co., 87 F.3d 1188, 1190-1192 (10th Cir. 1996) (in upholding preemption of inadequate signalization claim, court noted that fundamental issue is not what warning system is necessary under the federal regulations, but whether the federal government, by establishing 23 C.F.R. § 646.214(b)(3) and (4), has displaced state and federal decision-making authority); Williams, 925 F. Supp. at 451 (despite plaintiff's focus on the factors listed in 23 C.F.R. § 646.214(b)(3) and (4), the dispositive question is whether federal funds participated in the installation of the

crossbucks at the subject crossing).

The defendants rely heavily upon the Seventh Circuit Court of Appeal's decision in Shots v. CSX Transp., Inc.[3] for the proposition that the use of federal funds does not presuppose federal approval of the adequacy of the warnings, and that minimum compliance with the Manual on Uniform Traffic Control Devices does not trigger preemption. However, the Seventh Circuit's determination in Shots has been rejected by several other circuits, including the Eighth Circuit, Elrod v. Burlington N. R.R. Co., 68 F.3d 241, 244 (8th Cir. 1995), Tenth Circuit, Armijo, 87 F.3d at 1191, and most importantly, Fifth Circuit, Hester, 61 F.3d at 387 n.9.

CONCLUSION

For the foregoing reasons, the court finds that the plaintiff's motion for partial summary judgment should be granted, the plaintiff's motion to strike should be granted to the limited extent set forth herein, and the defendants' motion to strike should be denied. An order will issue accordingly.

THIS, the ____ day of May, 1997.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

[3] 38 F.3d 304 (7th Cir. 1994).